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IN THE

Supreme Court of the United States

October Term, 1964

No. 1077

DAVID M. LEVY,
Petitioner,

AGAINST

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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To The Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to review the decision and judgment of the Court of Appeals of the State of New York (Appendix A), modifying, by reversing in part, and affirming in part a decision and judgment of the Appellate Division, First Judicial Department, of the Supreme Court of the State of New York (Appendix B; R 1819-1820, 1827-1828)*, which affirmed a judgment of the Supreme Court of the State of New York, New York County (R 22).

* References in parentheses preceded by an "R" (R ...) are to the pages in the Record on Appeal in the New York Court of Appeals, on file in this Court.

Opinions Below

The opinion of the Court of Appeals of the State of New York is reported in 15 N. Y. 2nd 159 and is set forth herein as Appendix A. The opinion of the Appellate Division of the Supreme Court of the State of New York is reported in 20 A. D. 2nd 518 and is set forth herein as Appendix B.

Jurisdiction

The decision, judgment and remittitur of the Court of Appeals of the State of New York, the highest tribunal in the State, was entered on February 4, 1965.

The remittitur was amended, on motion of the petitioner, to reflect the federal constitutional issue involved and the amended remittitur was entered on March 11, 1965. The jurisdiction of this Court is invoked under Title 28, U. S. Code, section 1257. The petitioner's cause is founded upon rights secured by the Constitution of the United States, and specifically the Fourteenth Amendment thereto.

Question Presented

Is a defendant in a criminal trial deprived of due process of law and the right of effective cross-examination when the prosecutor and trial judge, knowing with certainty that a witness already indicted for a post-related offense will refuse to testify on grounds of self-incrimination, nevertheless call him to the stand and, in the presence of the jury, compel claims of privilege to 165 consecutive fact-laden questions, including the reading to the jury over objection of the witness' inadmissible confession? Is the prejudice created thereby—and found to exist by the high-

est state court—vitiated because the witness later, after having previously been threatened and beaten by police officers, remanded to jail in default of a half million ($500,000) dollars bail on an admittedly invalid contempt citation, returns to the stand and answers some, but not all, questions previously subject to proper claims of privilege?

Statement of Facts

The petitioner was indicted and convicted of robbery, kidnapping and possession of guns. The salient facts as set forth in the opinion of the New York Court of Appeals are (Appendix A, pp. 21-22):

> "In the early morning of December 31, 1961, Mr. and Mrs. John Mosler, stopping their car in front of 1035 Fifth Avenue where they lived, were accosted by two armed men who at gunpoint entered the car, one of them taking over the control of the car and the other getting in back.
>
> "On the trial it was established that John Richlia, who was a People's witness, was the driver of the car and defendant D'Antonio was the other active participant; there is proof also that defendants Levy and Maloney planned the crime in concert with the actual perpetrators.
>
> "Richlia drove the car north on Fifth Avenue to 88th Street, then east to Park Avenue, then south on Park Avenue to 81st Street, then west to Fifth Avenue, then north past the Mosler house and again east on 88th Street to First Avenue where the robbers got out of the car. The total length of the drive was 27 city blocks; the time 20 minutes.
>
> "While this trip was under way, earrings and two finger rings were taken from Mrs. Mosler. The earrings were taken while the car was going the

first time north on Fifth Avenue and the finger rings while it was turning into 88th Street. The robbery seems to have continued, as far as Mrs. Mosler was concerned, at least, in trying to find other jewelry on her person until after the car made its second turn into 88th Street.

"At a later point, but at a time not clearly described, Mr. Mosler was robbed of $300 in cash. It is evident, however, that the taking of Mr. Mosler's money was after Mrs. Mosler's jewelry had been taken, and it seems a fair inference from his description of the sequence of events that it was while the car was approaching First Avenue on the second trip eastward on 88th Street."

The Court of Appeals modified the judgment by reversing the conviction for kidnapping and dismissing the kidnapping counts of the indictment. It affirmed the conviction on the other counts, and petitioner, a first offender, is presently serving a sentence of 15 to 30 years in prison.

The prosecution called as to petitioner alone one Daniel Cohen who was an accessory after the fact, having allegedly assisted in disposing of the guns used in the robbery (R 792). Cohen had been convicted of bank robbery with a five year sentence (R 912), and at the time of his testimony he had pending (1) charges of possession of guns in Bronx County, (2) robbery charges in Queens County, and (3) a charge of conspiracy to commit robbery in New York County (R 912).

Prior to the trial Cohen had given to the district attorney a twenty-page statement, containing scores of questions and answers, many of them the rankest hearsay and patently inflammatory as to petitioner (marked Court Exhibit 4 for identification, R 789). Even a cursory examination of this statement (which was thereafter read to the jury) reveals that it was in fact the witness Cohen's con-

fession* to his participation in the robbery here charged to petitioner. Under no circumstances was this confession admissible as evidence in petitioner's trial. Nevertheless, as we will show, this trial judge permitted it to be read "into evidence" (R 798).

Upon being called to the stand Cohen was asked whether he had ever been convicted of a crime (R 787). To this question, he asked to speak privately to the judge and stated:

> "I have a gun charge pending against me in the Bronx. I am out on $10,000, bail, and my attorney feels that any testimony given here will be incriminating and advised me to refuse to answer any questions" (R 787-788).

The witness further stated to the court that the gun charge in the Bronx involved the same guns as were involved in this case (R 788).

After marking the incriminating confession as Court Exhibit 4 for identification, the trial court ruled that Cohen had waived his privilege by signing it and because he was being granted immunity from prosecution as an accessory but "excluding the gun for which you were picked up in the Bronx * * * I can give you no immunity on that whatsoever, and if you are guilty of that particular crime you must await the disposition of the case in the Bronx" (R 792).**

---

* It is significant that in its amended remittitur, the Court of Appeals characterizes Cohen's statement as his "confession" (see p. 13, *infra*, and Appendix A, p. 28).

** The limited grant of immunity was contrary both to the established law of New York (*In re Second Additional Grand Jury*, 8 N. Y. 2nd 220, 224; *People* v. *Riela*, 7 N. Y. 2nd 571) and the ruling of this Court in *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U. S. 52 (1964).

The trial court directed Cohen to answer the questions under threat of perjury or contempt; and at the same time he was denominated a hostile witness (R 795). Cohen refused to answer any questions, stating that his lawyer had advised him against so doing in view of the pending gun charge in Bronx County. His several requests to speak to his lawyer were peremptorily denied (R 796, 803, 804). It is significant that Cohen clearly stated to both prosecutor and trial judge his intention to refuse to answer on grounds of constitutional privilege before any refusals to answer were evoked in the presence of the jury.

Over constant and specific objection (*e. g.*, R 795, 798, 799, 800, 801, 814), the prosecutor produced before the jury the twenty-page confession which Cohen refused on the ground of constitutional privilege to recognize and he declined to state whether he had signed or initialed it (R 798). The trial court specifically ruled (R 798):

> "and the District Attorney, so that he may now know the disposition of the Court, is privileged to read into evidence the questions and answers in this exhibit and ask this witness whether or not he was asked those questions and gave those answers, and did so under oath."

(Note the ruling that the confession may be read "into evidence.")

The district attorney read to the jury page after page from the confession, pausing to ask as to each question: Do you remember that question, and do you remember that answer? Each time Cohen claimed his privilege (R 801-805).

At this point Cohen was held in contempt of court (R 805) and the prosecutor, under direction from the court

continued to read the questions and answers from the exhibit (R 805-808). Many of the questions and answers in the confession, which Cohen refused to acknowledge, dealt specifically with the petitioner (R 808-825). Illustrative of this set of questions and answers relating to the petitioner are the following:

> Q. [Reading from Cohen's confession] "Q. Now, what else did he [Levy] say? A. He asked me to go down to Karen's apartment and pick up a package from Karen. He did not say what was in the package (R 813-814). * * *
>
> Q. Continuing: "Q. Had you seen this girl known as Karen? A. Yes.
>
> "Q. Did you go to the apartment? A. Yes, I did.
>
> "Q. And what apartment is that? A. 19-X at 100th Street and Central Park West, brand new house, apartment house.
>
> "Q. Part of a project? A. Big house. I don't know if it's part of a project.
>
> "Q. Park West Village? A. I don't know.
>
> "Q. Did you go to the apartment? A. Yes, I did.
>
> "Q. Did you speak to Karen? A. Yes, I did.
>
> "Q. Did she know for what purpose you were there? A. Yes.
>
> "Q. Did she give you something? A. Karen withdrew from the closet a cardboard box. Inside the box there were two .45 calibre automatics.
>
> "Q. How many? A. Two .45 automatics."

Then a 'phone interruption lasting about a minute, 2:55.

> "Q. And? A. And two .32 calibre automatics. There also was some ammunition for the .45 calibres. All the guns were wrapped in a cloth" (R 814-815).

* * * * *

"Q. [reading from confession] "Q. Where did you go with the guns? A. To my apartment in the Bronx.

"Q. What did you do? A. I hid them in the house" (R 817).

* * * * *

"Q. What happened then? A. We then went to Dave's [Levy's] apartment house, which was a couple of blocks from the garage. In fact, I never been there at Dave's apartment house. We went into the lobby.

"Q. It's near the garage? A. A couple of blocks. We went into the lobby and Dave went into a room off the lobby, withdrawing a briefcase, and saying, 'You go out this way, I'm going out the other door, and walk to the nearest corner,' and I hailed a cab which I remember was going downtown. We had to go uptown and got home. Something else happened before this. When we were driving from the garage to the house I asked Dave if he wanted to talk about it, and he said, 'The Mosler case?' I said to Dave, 'Are you in any trouble? Were you identified?' and he said he didn't think so, he didn't know. He then took the briefcase from the lobby to a taxicab and went home" (R 817-818).

* * * * *

"Q. [reading from confession] "Q. The three guns were among the guns that you picked up either from Karen or from Dave Levy, is that correct? A. Yes.

"Q. You got them from Karen at Dave Levy's request? A Yes.

"Q. Which of the three guns came from Karen's house or Dave Levy's apartment house? A. I don't

know. They either came from Karen's apartment or from the apartment that Dave took me to near the garage."

The Court: Just a minute. You can ask him whether he remembers.

Q. Do you remember being asked those questions and making those answers to those questions on July 20, 1962 in my office, in the presence of Detective Justy? A. I respectfully refuse to answer on the grounds it might tend to incriminate or degrade myself" (R 823-824).

When the district attorney reached a most objectionable question and answer in the confession, the following occurred:

"Q. Do you wish to state to me the name of that person to whom you gave the gun? A. The person that I gave it to"——

Mr. Roberts [district attorney]: Before I read the answer, does your Honor wish to see the answer and determine whether I should read it?

The Court: Yes.

(Discussion at the bench between the Court and Mr. Roberts, out of the hearing of the jurors, off the record.)

The Court: You may ask him whether he remembers giving that answer.

"Q. Did you wish to state to me the name of that person to whom you gave the gun? A. *The person I gave it to is a known killer and a tough guy, and I'm in fear of my life.*"

Q. Do you remember being asked those questions and giving those answers on July 20, 1962 in the presence of John Justy? A. I most respectfully refuse on the grounds it might tend to incriminate or degrade myself, *or to get me killed.*

The Court: You are directed to answer.

The Witness: I most respectfully refuse" (R 825-826). (Italics added.)

During the reading of the confession, the district attorney digressed to ask Cohen whether he knew one "Muscles Futterman" and whether he gave any weapon to "Muscles Futterman" (R 809). The witness refused to answer. "Muscles" was not further identified.

Following the completion of the reading, the trial judge excused the jury for lunch without so much as a word of admonition regarding the hours of prejudicial interrogation and refusals to answer they had witnessed, and then he ordered Cohen's arrest for contempt of court. Cohen was remanded to custody and held in $500,000 bail (R 828-830).

After the luncheon recess the court permitted Cohen to confer with his lawyer who reaffirmed that he had advised Cohen to claim his privilege (R 838). Cohen complained to the judge about not only having been threatened but also beaten by a police officer in the witness room (R 839), and stated (R 840):

"I want nothing to do with this case, I will take thirty, sixty, ninety years. I will answer no more questions. Do what you have to do.

"The Court: You have decided not to answer any questions?

"The Witness: Yes, your Honor.

"The Court: All right. Bring in the jury, please."

The court then permitted other questions and refusals to answer (R 841). Only then was Cohen excused (R 843), with the court for the first time briefly admonishing the jury that it should disregard "as having no significance and of being of no probative value" "all of the questions asked by the District Attorney which were not answered by the witness" (R 842). The instruction was tempered by the statement that the jurors should strike the questions from their minds, "as much as you possibly can, and as far as humanly possible for you to do so" (R 843).

Appropriate motions for a mistrial were made, denied and exceptions noted (R 844-852).

The next day, after the prosecutor completed the direct examination of another witness, one Procho, who testified that Cohen had turned over to him several guns (admitted into evidence [R 875]),* the prosecutor announced that "Cohen is ready, willing and able to testify" (R 896). This was after Cohen had been jailed for criminal contempt (R 829, 859), had been assigned that morning a new attorney selected by the trial judge (R 860) and had been visited by his wife and father (R 860, 861, 863-864).**

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* At the point when the guns were admitted into evidence, the only connection between such guns and petitioner was contained in a question set forth in Cohen's confession, which Cohen had refused to acknowledge (R 819).

** Defense counsel at the trial objected to the court's participation in the "psychological duress" and "unilateral approach to a criminal contempt on the part of the court, not at the behest of the District Attorney's Office" (R 865). The objection was made to the court's

While some of the answers then elicited from Cohen (R 900-917) had been contained in his confession previously read to the jury, he was not asked such questions as those relating to the "known killer" (R 825, *supra*, p. 9), "Muscles Futterman" (R 809, *supra*, p. 10), and alleged admissions to him by petitioner (R 817, *supra*, p. 8).

The Manner in Which the Federal Question Was Raised

The federal question to be reviewed herein was raised at the trial on grounds both of the lack of the rights of "confrontation" and "cross-examination" (R 846) and denial of "due process" (R 848), and was presented in petitioner's brief before the New York Court of Appeals (Point I) and his reply brief therein (pp. 2-3), and in the oral argument before that Court. The question is considered in the opinion of the Court of Appeals (Appendix A). After modifying and affirming the judgment of conviction, the Court of Appeals amended its remittitur to recite the fact of the federal question's having been presented. The amended remittitur states (Appendix A, p. 28):

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz., defendants argued that they were deprived of due process of law under the Fourteenth Amendment when the People called a witness (Daniel Cohen) to the stand know-

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dominant role in coercing the witness to change his position and testify against petitioner. Counsel further stated:

> "I think that the placing of this witness in the hands of the Police Department, in view of the statements made by this witness, the attack or before that, the proceedings, all of them, taken in relation to this witness, are using the forces of the court, the forces of law and order, to psychologically coerce or duress this witness Cohen to give testimony on behalf of the People" (R 865).

ing that he would claim privilege against self-incrimination to testify and then read to the jury his alleged confession. The Court of Appeals held that there was no violation of defendants' constitutional rights."

Reasons for Issuance of the Writ

The New York Court of Appeals decided a substantial question concerning the Federal Constitution which involves a facet of the fundamental principles considered by this Court in the just decided *Douglas* v. *Alabama*, No. 313, October Term, 1964, certiorari granted 379 U. S. 815 (October 12, 1964), and decided April 5, 1965. We urge (1) that the question of a reluctant witness for the prosecution claiming privilege before the jury to the prejudice of the defendant on trial raises a substantial issue of violation of due process and right to cross-examination, and (2) that such question was decided erroneously by the New York Court of Appeals. If due process, equal protection and effective cross-examination under the Fourteenth Amendment are to be meaningful rights secured to defendants in state criminal prosecutions, then this Court must exercise its appellate jurisdiction in this case to insure consistency of application of those carefully guarded rights.

1. A defendant in a criminal trial is deprived of due process of law and the right to effective cross-examination when the prosecutor, knowing with certainty that one indicted for a post-related offense will refuse to testify on grounds of self-incrimination, calls him to the stand, compels claims of privilege and reads over objection the witness' inadmissible confession.

This Court considered in *Douglas* v. *Alabama, supra,* —— U. S. ——, decided April 5, 1965, one of the fundamental problems raised in this case. This Court there held

that the petitioner's right of confrontation was violated by the trial court's allowing a witness' inadmissible confession to be read to the jury while the witness claimed privilege against self-incrimination. The concurring opinions of Mr. Justice Stewart and Mr. Justice Harlan agreed with the resultant reversal of the conviction, but limited the grounds for decision to deprivation of liberty without due process in violation of the Fourteenth Amendment. Under either theory, petitioner Levy's position is similar to that of Douglas.*

The overwhelming majority of state court and lower federal court cases which have considered the issue have held that examination of a prosecution witness, who the prosecutor knows will claim privilege, is highly prejudicial and is violative of the fundamental concept of fair trial procedure required by the due process clause of the Fourteenth Amendment (*e. g., De Gesualdo* v. *People,* 147 Colo. 426, 364 P. 2d 374 [1961]; *Washburn* v. *State,* 164 Tex. Crim. 448, 299 S. W. 2d 706 [1956]; *Kaplow* v. *State,* 157 So. 2d 862 [Fla. 1963]; *State* v. *Dinsio,* 176 Ohio St. 460, 200 N. E. 2d 467 [1964]; *United States* v. *Maloney,* 262 F. 2d 535 [C. A. 2, 1959]; *United States* v. *Tucker,* 267 F. 2d 212 [C. A. 3, 1959]; *Fletcher* v. *United States,* 332 F. 2d 724 [C. A. D. C., 1964]). The commentators are almost unanimous in condemning such prejudicial conduct as violative of a defendant's right to a fair trial (Andrew, The Reluctant Witness for the Prosecution, 55 J. Crim. L. C. & P. S. 1; 67 Harv. L. Rev. 1073; 45 Va. L. Rev. 596; 23 U. Pitt. L. Rev. 813; see Annotation, 86 A. L. R. 2d 1443).

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* The instant case presents an even more flagrant situation than is found in *Douglas.* In *Douglas,* the inadmissible confession was put to the witness Loyd "in twenty-one consecutive fragments by questions" (*Douglas,* petition for certiorari, p. 29a). Here the Court of Appeals found no error when the "prosecutor asked over 150 questions, reading from the statement" (Appendix A, pp. 25-26).

A basis for these condemnatory holdings is the recognition that juries of laymen, from the witness' invocation of the privilege against self-incrimination, infer guilt not only of such witness but also of the factually connected defendant (*DeGesualdo* v. *People, supra,* 147 Colo. 426, 432-433, 364 P. 2d 374, 378; Andrew, *loc. cit.;* 23 U. Pitt. L. Rev. 813, 814).

In the annotation in 86 A. L. R. 2d 1443, the following pertinent comment is found (at 1445):

> "In order to succeed on a claim of prejudicial error founded on the calling as a prosecution witness of an associate in crime who refused to testify under claim of privilege, the record must show that the prosecutor called the witness 'in bad faith'. Depending on the factual setting, this may mean that the prosecutor knew in advance that the witness intended to or would invoke his privilege, that he had reason to anticipate from the witness' situation or prior conduct that he would do so, or that he had no reasonable basis for expecting that the witness would waive his privilege and testify."

Here Cohen, an accessory after the fact (and thus obviously an "associate in crime") had specifically advised both the prosecutor and the trial judge "in advance," and outside of the hearing of the jury, that he would claim his constitutional privilege and refuse to testify. With full advance knowledge of Cohen's position, the conclusion is ineluctable that the hours-long interrogation in the presence of the jury compelling claims of privilege to scores of fact-laden questions, was done in a manner calculated to prejudice petitioner's constitutionally protected rights. Even if it be assumed—contrary to fact—that Cohen's interrogation started in good faith, Cohen's statement of his intention not to testify followed by his initial refusal to answer should have brought home to

the court and prosecution that he would continue to claim the privilege. Further interrogation concerning the entire 20 page confession was both prejudicial and inflammatory.

While the court below (Appendix A, p. 26) accepted the principle that it was prejudicial error by the prosecution to call Cohen and read his confession, knowing that he would claim the privilege against self-incrimination, it nevertheless went on to hold that the prejudice created thereby was rendered harmless by Cohen's later resuming the stand and answering some of the questions contained in his confession. The fallacy and harmful consequences of such holding are demonstrated in the following point.

2. The court below erred in holding that Cohen's subsequent answering some of the questions contained in the inadmissible confession vitiated the initial prejudice.

As noted, following the reading of his confession, Cohen was remanded to custody and held in $500,000 bail. The next morning he was assigned a new attorney selected by the trial judge and was visited by his wife and father. In the face of these mounting pressures, it was not long before the prosecutor could announce that "Cohen is ready, willing and able to testify." In these circumstances there can be no doubt concerning the trial judge's dominant role in coercing Cohen to change his position and testify against petitioner.

In holding that Cohen's later answering some of the questions cured the initial constitutional infirmity, the Court of Appeals stated (Appendix A, p. 26):

> "But, as the People argue, Cohen was recalled and his testimony covered substantially all matters

> stated in the prior questions, and, although Levy argues that Cohen on recall answered 'some questions', he does not demonstrate a prejudicial differential between those asked and not answered and those asked and later answered.
>
> "It can be argued both ways what the effect of this kind of trial strategy is. A jury might well look with suspicion on the testimony of a witness who refuses to answer and then does answer questions. Levy argues it the other way, that 'the jury with the explosive events of the Cohen interrogation fresh in their minds could only be expected to give his later testimony much greater weight and consideration than it deserved.' This does not necessarily follow. The Judge gave the jury immediate and specific instructions to disregard the unanswered questions."

The answer to such reasoning is multifold. First, highly prejudicial and inflammatory matter contained in the confession which had previously been read "into evidence" was not included in Cohen's subsequent testimony. Thus, Cohen was not asked such questions as those concerning the "known killer" (R 825, *supra*, p. 9) "Muscles Futterman" (R 809, *supra*, p. 10), and alleged admissions by petitioner (R 817, *supra*, p. 8). The omission of these matters in Cohen's testimony does, we submit, "demonstrate a prejudicial differential between those asked and not answered and those asked and later answered." Even a residual drop of poison may accomplish its lethal purpose. In light of Mr. Justice Brennan's opinion in *Douglas*, *supra*, we emphasize the fact that the district attorney purposely avoided asking Cohen about these inflammatory matters which he had succeeded in bringing before the jury during the reading of the confession. This demonstrates the impossibility of petitioner's cross-examining Cohen on these matters.

Second, where, as the court below stated, "[i]t can be argued both ways what the effect of this kind of trial strategy is," there is a negation of the imbedded principle that the State must prove defendant's guilt beyond a reasonable doubt to permit a jury to resolve the doubtful issue against defendant. As this Court pointed out in *Jackson* v. *Denno*, 378 U. S. 368, where the constitutional rights of a defendant are involved it is hazardous and improper to speculate as to how a jury reacted. Certainly, petitioner, serving a 15-30 year sentence, cannot afford the luxury of such speculation.

Third, there is a strong policy argument against sanctioning the procedure approved, or at least condoned, by the court below. Cohen had made it crystal clear at the outset that he would claim the privilege and would refuse to answer any questions. Nevertheless, the prosecutor was permitted to read into evidence his entire confession. Then the trial judge improperly held Cohen in contempt of court, fixing bail at $500,000. The obvious purpose of such unreasonable bail was to coerce the witness. The next morning the court's and prosecution's tactics are changed to "soften up" the witness: he is assigned new counsel and permitted a visit by his wife and father. Upon recall to the stand, Cohen is studiedly not interrogated about the most prejudicial and most reprehensible of the questions whose impact had already been made upon the jurors' minds.

While we have found no other case in which the pressured activities of court and prosecution have caused the reluctant witness to change his mind and testify after claiming his privilege to a host of questions, *Kaplow* v. *State*, *supra*, 157 So. 2d 862 (Fla. 1963), points to the proper solution in requiring a new trial. In *Kaplow* the prosecution called one of the defendants as its witness. After giving his name, address and place of present employment, this defendant was asked but one question—

whether he had been employed by a co-defendant—which he refused to answer on the ground of self-incrimination. The claim of privilege was upheld. Subsequently, this defendant as a witness for the defense began answering questions concerning his employment by a co-defendant—the same question to which he earlier claimed privilege. The prosecution moved to hold him in contempt, whereupon defense counsel upon removal of the jury unsuccessfully sought a mistrial. In reversing the conviction the court stated (pp. 864, 866):

> "We also realize that it might be said that Wilson's action in taking the stand in his own behalf and answering the questions previously asked him by the State effected a waiver of any objection that he might have had to the questions as asked by the State. However, we think that the issue goes a bit further than this; we feel that when a defendant is required by the State to take the stand, and is asked questions which the State knows full well the witness will refuse to answer, this defendant, as well as his hapless co-defendants, has been prejudiced in the eyes of the jury to the extent that a fair trial is impossible. It may be unfortunate, but it is nevertheless a truism that there is an onerous stigma attached to a defendant's claiming his privilege under the Fifth Amendment. And when the defendant is forced to stigmatize himself and his co-defendants, in the presence of the jury, due to the conduct of the State in using such tactics, said defendant has been irreparably prejudiced.
>
> * * * * *
>
> "We feel that reason and justice, as represented by the better and majority view, require us to hold that the appellants in this case suffered irreparable damage and injury in the eyes of the jury by Wil-

> son's being ordered to take the stand and thereby being forced to plead the Fifth Amendment. The appellants could not possibly have received a fair trial under these circumstances."

There can be no doubt that the minute cautionary admonition, given in a fleeting moment after the hours of prejudicial interrogation and before Cohen resumed the stand, did not cure the basic error complained of. Significantly, when Cohen returned to the stand to answer questions, no instruction was given concerning the most prejudicial questions in the confession which were not the subject of the later testimony. Pertinent is the observation of Mr. Justice Jackson, concurring, in *Krulewitch* v. *United States*, 336 U. S. 440, 453, quoted approvingly in *Jackson* v. *Denno*, *supra*, 378 U. S. 368, 388, note 15: "The naive assumption that prejudicial effects can be overcome by instructions to the jury, *cf. Blumenthal* v. *United States*, 332 U. S. 539, 559, all practicing lawyers know to be unmitigated fiction. See *Skidmore* v. *Baltimore & Ohio R. Co.*, 167 F. 2d 54."

CONCLUSION

For the reasons above stated and in light of this Court's decision in *Douglas* v. *Alabama*, *supra*, it is respectfully submitted that this petition for a writ of certiorari should be granted, the judgment vacated and cause remanded for a new trial.

Respectfully submitted,

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Attorney for the Petitioner.

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APPENDIX A

Opinion of the New York Court of Appeals, Reported in 15 N. Y. 2d 159

BERGAN, J.:

In the early morning of December 31, 1961, Mr. and Mrs. John Mosler, stopping their car in front of 1035 Fifth Avenue where they lived, were accosted by two armed men who at gunpoint entered the car, one of them taking over the control of the car and the other getting in back.

On the trial it was established that John Richlia, who was a People's witness, was the driver of the car and defendant D'Antonio was the other active participant; there is proof also that defendants Levy and Maloney planned the crime in concert with the actual perpetrators.

Richlia drove the car north on Fifth Avenue to 88th Street, then east to Park Avenue, then south on Park Avenue to 81st Street, then west to Fifth Avenue, then north past the Mosler house and again east on 88th Street to First Avenue where the robbers got out of the car. The total length of the drive was 27 city blocks; the time 20 minutes.

While this trip was under way, earrings and two finger rings were taken from Mrs. Mosler. The earrings were taken while the car was going the first time north on Fifth Avenue and the finger rings while it was turning into 88th Street. The robbery seems to have continued, as far as Mrs. Mosler was concerned, at least, in trying to find other jewelry on her person until after the car made its second turn into 88th Street.

At a later point, but at a time not clearly described, Mr. Mosler was robbed of $300 in cash. It is evident, however, that the taking of Mr. Mosler's money was after Mrs. Mosler's jewelry had been taken; and it seems a fair inference from his description of the sequence of events that it was while the car was approaching First Avenue on the second trip eastward on 88th Street.

The attempt to get more jewels from Mrs. Mosler thus continued into the second movement east in 88th Street and the sequence of narration suggests that Mr. Mosler was robbed while the car was proceeding between Fifth and First Avenues. This was, according to the narrative of Mr. Mosler "Prior to reaching" the corner of "88th Street and First Avenue". His answer to that question continued: "Let me see if I can remember the exact point —I don't know the exact time or not, but at a point in the route of the car, the trip of the car, I had a ring of sentimental value, and a watch of sentimental value, which I didn't want to give to the gunmen, if possible. I, however, reached into my pocket and I withdrew my wallet and I handed it to him and said, 'Here's my wallet', and he took my wallet."

These three defendants were each convicted of two counts of kidnapping, of two counts of robbery first degree and of criminally possessing a pistol. On the kidnapping charges each was sentenced to twenty years to life; for the robbery, Levy was sentenced to 15 to 30 years; D'Antonio, 15 to 25 years; and Maloney from 10 to 11 years; for the gun charges all received suspended sentences. The prison sentences run concurrently. The Appellate Division unanimously affirmed the judgment.

Kidnapping is, by contemporary statutory standards, one of the most serious of crimes. In our era this crime has assumed particularly reprehensible forms. It may under some circumstances be punishable by death (Penal

Law, §1250). The minimum penal sentence is twenty years to life, as compared with rape in the first degree which entails a maximum punishment of 20 years (Penal Law, §2010 [5]) and robbery first degree which entails a maximum punishment of thirty years (Penal Law, §2125).

In basic concept the crime of kidnapping envisages the asportation of a person under restraint and compulsion. Usually the complete control of the person and the secrecy of his location are means of facilitating extortion. But since the control may be accomplished in a variety of ways, the New York statute has been drafted in very broad terms. Much of the definition relates to traditional forms of kidnapping, but literally embraces in its terms any restraint. It provides, e.g., that one who "confines" another with intent to "cause him to be confined" against his will is guilty of kidnapping (Penal Law, §1250, subd. 1).

This definition could literally overrun several other crimes, notably robbery and rape, and in some circumstances assault, since detention and sometimes confinement, against the will of the victim frequently accompany these crimes. Some of the definitions could apply alike to kidnapping and abduction. It is a common occurrence in robbery, for example, that the victim be confined briefly at gunpoint or bound and detained, or moved into and left in another room or place.

It is unlikely that these restraints, sometimes accompanied by asportation, which are incidents to other crimes and have long been treated as integral parts of other crimes, were intended by the Legislature in framing its broad definition of kidnapping to constitute a separate crime of kidnapping, even though kidnapping might sometimes be spelled out literally from the statutory words.

The problem in relation to rape and assault was considered by the court in *People* v. *Florio* (301 N. Y. 46). A girl was enticed into an automobile and forcibly detained and driven from Manhattan to an isolated place in Queens where she was raped. Convictions for kidnapping as well as for rape and assault were sustained.

We now overrule *People* v. *Florio* to limit the application of the kidnapping statute to "kidnapping" in the conventional sense in which that term has now come to have acquired meaning. There may well be situations in which actual kidnapping in this sense can be established in conjunction with other crimes where there has been a confinement or restraint amounting to kidnapping to consummate the other crime. But the case now before us is essentially robbery and not kidnapping.

The precise situation in which both kidnapping and other crimes such as robbery or rape are sustainable together are reserved until an appropriate case arises. *People* v. *Black* (18 A. D. 2d 719), is an illustration of separately established crimes of robbery and kidnapping. One of the victims of the robbery was taken along as a hostage to another State and held for a considerable time, long after the robbery had been completed.

In the case before us the movement of the automobile, which was itself the situs of the robbery, was not essentially different in relation to the robbery than would be the tying up of a victim in a bank and his movement into another room. In essence the crime remained a robbery although some of the kidnapping statutory language might literally also apply to it.

The main decisions relied upon in support of the kidnapping conviction do not come up to the problem before us. *People* v. *Hope* (257 N. Y. 147), considered a real

kidnapping and did not involve contemporaneous robbery, which is the critical point in the present case. *People* v. *Black* (supra), as we have noted, involved clearly separate crimes of robbery and kidnapping.

In *People* v. *Small* (249 App. Div. 863, affd. 274 N. Y. 551), the interrupted acts of seizure of the victims, as far as they went, suggested kidnapping and no purpose to rob was established. Although the Federal Kidnapping Act (18 U. S. C. §408-a) differs from ours in text, it, too, is broadly drafted and the Supreme Court in *Chatwin* v. *United States* (326 U. S. 455), took precautions to see that its application was limited to acts which were in the nature of true kidnapping.

This separation of essentially separate crimes is consistent with the general trend of professional comment and analysis of kidnapping statutes which could be read to include acts which are integral to other crimes and are not essentially kidnapping. (See, e.g., *A Rationale of the Law of Kidnapping*, 53 Col. L. R. 540, Note 20; *Judicial Construction of Kidnapping Statutes*, 15 Albany L. R. 65; *Room to Room Movement: A Risk Rationale for Aggravated Kidnapping*, 11 Stanford L. R. 554; *Kidnapping and the Element of Asportation*, Note 35 Southern Cal. L. R. 212; Note 110 U. of Penn. L. R. 293.)

Appellant Levy also contends that the latitude given the prosecutor in questioning Daniel Cohen, a reluctant witness called only against Levy, severely prejudiced this appellant, and the other defendants join him, arguing an adverse effect on them. Cohen had given the District Attorney a sworn statement implicating Levy in the possession of guns. On the stand he refused on the ground of self-incrimination to testify to the facts of this statement. The prosecutor asked over 150 questions, reading

from the statement. Many of the questions thus read and not answered were, in that state of the record, prejudicial.

Had Cohen not later answered the questions a reversal of any resulting judgment against Levy would be indicated. Extended examination of a prosecution witness who, it is known in advance by the prosecutor, will claim privilege or after it becomes clear he will claim it, is prejudicial. (See, e.g., *United States* v. *Maloney*, 262 F. 2d 535; *United States* v. *Tucker*, 267 F. 2d 212; *Washburn* v. *State*, 299 S. W. 2d 706 [Tex.]; *DeGesauldo* v. *People*, 147 Colorado 426.)

But, as the People argue, Cohen was recalled and his testimony covered substantially all matters stated in the prior questions, and, although Levy argues that Cohen on recall answered "some questions", he does not demonstrate a prejudicial differential between those asked and not answered and those asked and later answered.

It can be argued both ways what the effect of this kind of trial strategy is. A jury might well look with suspicion on the testimony of a witness who refuses to answer and then does answer questions. Levy argues it the other way, that "the jury with the explosive events of the Cohen interrogation fresh in their minds could only be expected to give his later testimony much greater weight and consideration than it deserved." This does not necessarily follow. The Judge gave the jury immediate and specific instructions to disregard the unanswered questions.

The questions having been answered, and due precautionary instructions having been given by the judge concerning the prior unanswered form of the questions, error requiring reversal on this ground is not demonstrated. Other grounds discussed by appellants do not require analysis.

The judgment should be modified by reversing the conviction of each defendant for kidnapping and dismissing the kidnapping counts of the indictment; and as thus modified affirmed.

BURKE, J.: (Dissenting)

"These crimes had no connection with each other except insofar as the defendant[s] might have believed that [the detention] would give them some insurance against close pursuit". *People* v. *Black*, 18 App. Div. 2d 719, 721. In *People* v. *Hope*, 257 N. Y. 147, 153, the complainant had been confined for only about a mile. This Court affirmed the conviction for kidnapping. We have also affirmed a conviction for kidnapping where the incident covered only two minutes in *People* v. *Small*, 274 N. Y. 551. The statute was designed to punish and thus reduce the occurrence of the professional criminal practice of detaining the victim of a crime in order to assure the safety of the flight of the criminal by preventing an outcry by the victim and the possibility of pursuit. This decision encourages such a practice.

* * * * *

Judgments modified by reversing the conviction of each defendant for kidnapping, the kidnapping counts dismissed and, as so modified, judgments affirmed. Opinion by Bergan, J. All concur except Burke, J., who dissents and votes to affirm in a memorandum in which Dye and Scileppi, JJ., concur.

The order of the Court of Appeals, dated March 11, 1965, which granted petitioner's motion to amend the remittitur, reads as follows:

"A motion to amend the remittitur in the above cause having heretofore been made upon the part of appellants

Levy and D'Antonio herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended to read, as follows:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz., defendants argued that they were deprived of due process of law under the Fourteenth Amendment when the People called a witness (Daniel Cohen) to the stand to testify knowing that he would claim privilege against self-incrimination and then read to the jury his alleged confession. The Court of Appeals held that there was no violation of defendants' constitutional right.

AND the Supreme Court of New York County hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly."

APPENDIX B

Opinion of the Appellate Division, New York Supreme Court, First Judicial Department, Reported in 20 A. D. 2d 518, 244 N. Y. S. 2d 497

PER CURIAM

Judgments of conviction convicting the defendants of the crimes of kidnapping, robbery in the first degree, and criminal possession of a pistol, unanimously affirmed. In the circumstances of this case the assignments of error do not warrant a reversal of the judgments appealed from. While there were errors made during the course of this four week trial they are not of such nature, either separately or collectively, as to affect the substantial rights of the defendants (Code of Criminal Procedure, §542). One of the alleged errors which merits some discussion is the trial court's failure to charge, as requested, that "if the jury finds that the detention * * * was for a short period incidental to the crime of robbery, and occurring during the immediate act of commission of such crime, then such detention will not form a basis for the crime of kidnapping * * *." While this requested charge is a correct statement of the applicable law (People v. Florio, 301 N. Y. 46, 92 N. E. 2d 881), the failure to so charge in the light of the facts of this case was not error. It appears that the detention of the complaining witnesses extended over a period of some twenty minutes and that the acts of "robbery" were of relatively short duration. Indeed, the victims were kept in custody beyond the time necessary for the completion of the robbery and driven about until the defendants were ready to take them to a location prearranged by those participating in the robbery. There was thus no need to charge as requested, as the premise for such a charge—a short period of detention during the immediate acts of a robbery—may not be found in this record. No such charge was given in the case of People v. Florio, supra, where the court held that the record did not support a finding that the detention was only incidental to the commission of the underlying felony. In that case, despite such omission to charge, the judgments of conviction were affirmed.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 1077 [redacted]

DAVID LEVY,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

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THE PEOPLE OF THE STATE OF NEW YORK,

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On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

This is a petition for a writ of certiorari to the Court of Appeals of the State of New York, to review a judgment of that court rendered February 4, 1965, modifying a judgment of the Appellate Division, First Department, rendered December 5, 1963, which had affirmed a judgment of the Supreme Court, New York County, rendered November 27, 1962, convicting petitioner and two others of the crimes of kidnapping [N. Y. Penal Law §1250], robbery

in the first degree [N. Y. Penal Law §2124] and criminally possessing a pistol [N. Y. Penal Law §1897]. The Court of Appeals reversed the convictions for kidnapping, dismissing the kidnapping counts of the indictment, and affirmed the judgments convicting petitioner of the crimes of robbery in the first degree and criminally possessing a pistol.

Question Presented

Was the petitioner deprived of due process of law and the right of confrontation when a witness for the prosecution initially claimed his privilege against self-incrimination and refused to answer questions inculpating petitioner, but later testified to the same matters embodied in those questions?

Statement of the Case

The Crime

In the early morning hours of December 31, 1961, Mr. and Mrs. John Mosler, stopping their car in front of their home at 1035 Fifth Avenue in New York City, were accosted by two armed men, John Richlia and the co-defendant Louis D'Antonio, who forced their way into the Moslers' automobile. Holding their victims at gun point, the bandits deprived Mrs. Mosler of valuable rings and earrings and Mr. Mosler of his wallet. They continued to drive the imprisoned victims around the east side of Manhattan until they reached the appointed rendezvous where confederates waited in another car. In the other car were

the petitioner, David Levy, who had planned and supervised the operation and his lieutenant, the co-defendant, Patrick Maloney.

In addition to the Moslers' account of what occurred, the guilt of the defendants was proved by the testimony of the accomplice, Richlia, who had pleaded guilty to third degree robbery and was awaiting sentence. Richlia was fully corroborated by the testimony of Levy's paramour, Imogene Ruh, who overheard the plotting of the crime. Her testimony with respect to Levy's possession of the pistols, was corroborated by the witness Daniel Cohen.

The Questioning of the Witness Daniel Cohen

Daniel Cohen was called as a witness by the prosecution. After stating his name, residence and marital status he asked to speak to the judge. Out of the hearing of the jurors, he told the court that he had a pending charge in the Bronx involving the weapons in this case, and had been advised by his attorney to refuse to answer questions (2359-62).* The court declared a recess, and had marked for identification a sworn statement taken by the prosecutor from the witness on July 20, 1962 (2364-70). The court then read into the record, out of the jury's presence, a portion of the statement which included a promise by the assistant district attorney that the witness would be granted immunity on the disposal of the guns. Although the immunity would not extend to the possession of the gun for which the witness was indicted in the Bronx, Cohen had agreed to testify (2370-6). As to the questions and answers which followed, the court opined that the wit-

* References, unless otherwise noted, are to the folios of the printed record.

ness had voluntarily waived his privilege and, in addition, had immunity pursuant to New York Penal Law Section 2447 in "this jurisdiction only" (2376-81).

After warning Cohen that if he did not answer the questions put to him by the district attorney and answer them truthfully, he would be subject to charges of perjury and contempt, the court brought the jury back. A series of questions relating to the taking of the prior statement was asked which the witness again declined to answer. The court, noting that Cohen was "definitely a hostile witness," instructed the prosecutor to ask him whether he recalled being asked certain questions and giving certain answers (2394, 2396-7). Complying, the prosecutor sought to break Cohen's obstinate silence by asking whether he recalled questions and answers previously made, as reflected by the statement. In each instance, the witness stood fast, asserting that his answer might tend to degrade or incriminate himself, adding, in one case, that an answer might "get me killed" (2397-2480). The court told the witness that his refusal consisted of contempt of court (2414). Then, in the absence of the jurors, who had recessed for lunch, he was held in bail by the court on the charge of contempt (2481-9).

Before the jury returned from lunch, the court advised Cohen that the immunity granted hitherto, encompassed all of New York State including Bronx County. Mr. Theodore Rosenberg, who had previously represented Cohen, conferred with him, and informed the court that Cohen was now advised by him as to his legal obligations to answer questions (2510-14). The jury was brought back,

and Cohen was asked a question by the prosecutor. Upon his refusal to answer despite the court's direction, and his further statement that he would answer no questions at all, the court stated that no purpose would be served by asking him any additional questions. The court then addressed the jury:

> "The Court: Now, I wish to say this to the jury most emphatically. Ladies and gentlemen of the jury, before this trial actually began and evidence was adduced, I instructed you, and on numerous occasions during the trial I instructed you, and I now instruct you again, that a question in and of itself is evidence of nothing.
>
> "All of the questions asked by the District Attorney which were not answered by the witness are to be disregarded by you as having no significance and being of no probative value, and I instruct you and admonish you that they are not evidence in the case to be considered in any way, shape or manner of form. Any of the questions that the District Attorney may have asked which elicited no answer from the witness, or which resulted in a refusal to answer by the witness, are not evidence. You are to draw no inference therefrom; you are not to surmise what the answer mig' t have been, and you are to disregard them and strike them from your minds as much as you possibly can, and as far as humanly possible for you to do so, and you are to decide this case on that evidence which remains in the case.
>
> "The District Attorney was permitted to ask a great many questions in the hope that he might give some testimony that you could consider as evidence, but insofar as he has not done so, you are admonished to disregard any of the questions, take no implication

therefrom and regard those questions as no part of the case" (2525-8).

Another witness was called, after which Cohen was returned and did testify. In essence, he testified that he assisted Levy in the disposal of the weapons which Levy had kept in his apartment (2704-37). This testimony covered the very same matters previously stated in the interview with the prosecutor about which he had been asked earlier and had refused to testify.

Summary of Argument

The fact that the witness who had originally refused to testify, later did testify to the very same matters about which he had previously claimed his privilege against self-incrimination, destroys any claim of unconstitutionality. By virtue of this testimony, petitioner had a full opportunity to cross-examine and thus suffered no impairment of his right of confrontation. Nor was it improper for the trial court to permit the prosecutor to question the witness despite the initial refusal to testify. Both court and prosecutor justifiably sought to compel the witness to testify pursuant to a grant of immunity and in accordance with the witness' sworn promise to testify. The continued questioning, under such circumstances, served legitimate state purposes, and in no way unfairly prejudiced the petitioner, especially since the witness did in fact later testify pursuant to a binding grant of immunity.

ARGUMENT

The fact that a witness for the prosecution was asked questions inculpating the petitioner, after the witness had claimed his privilege against self-incrimination, did not deprive petitioner of due process of law and the right of confrontation, since the witness later did testify. Nor was the initial questioning of the witness improper.

According to the petitioner, the incident involving the witness Cohen resulted in the destruction of his right to a fair trial, in that he was deprived of due process of law and the right to effective cross-examination. Both the calling and the questioning of the witness, it is claimed, amounted to error of constitutional dimension. Support for this contention is sought in a number of federal and state cases [*Douglas* v. *Alabama,* —— U. S. —— (1965), 85 S. Ct. 1074 (1965); *Fletcher* v. *United States,* 332 F. 2d 724 (C. A. D. C. 1964); *United States* v. *Maloney,* 262 F. 2d 535 (2d Cir. 1959); *United States* v. *Tucker,* 267 F. 2d 212 (3d Cir. 1959); *State* v. *Dinsio,* 200 N. E. 2d 467 (Ohio 1964); *Kaplow* v. *State,* 157 So. 2d 862 (Fla. 1963); *DeGesualdo* v. *People,* 364 P. 2d 374 (Colo. 1961); *Washburn* v. *State,* 299 S. W. 2d 706 (Tex. 1956)], all of which involve, under varying circumstances, the claim of privilege against self-incrimination by a witness, and all of which are readily distinguishable from the case at bar.

In the cited cases, the questioning of the justifiably fearful witnesses served no purpose other than to prejudice the defendant unfairly. Here, as explained below, the purpose of the questioning was to uncover the witness'

reluctance and hostility and to compel him to testify pursuant to a grant of immunity and in compliance with his sworn promise to do so. That the examination which uncovered this reluctance and hostility and which culminated in his testifying was in no way "evidence" in the case, was expressly acknowledged by the court both in colloquy at the bench and in the statement to the jury, quoted above. The evidence in the case was his later testimony, given under a complete grant of immunity, which obviates any contention of prejudice resulting from the means employed to obtain it.

Indeed, it is this latter circumstance which, in itself, constitutes a complete refutation of the petitioner's claim. The reason for this is plain. Permitting a prosecutor to question a witness who is claiming his privilege against self-incrimination creates the possibility of placing before the jury "inferences * * * not subject to cross-examination" [*Namet* v. *United States*, 373 U. S. 179, 187 (1963)]. If, for example, the prosecutor knowingly calls an alleged accomplice to the stand to secure from him a refusal to testify and uses his presence on the stand as a pretense for reading to the jury an alleged confession of the witness that is inadmissible against the defendant, there exists just such a danger [see *Douglas* v. *State*, *supra*]. But that danger dissolves when the witness does, in fact, testify to the very same matter about which he previously had claimed his privilege. The "inferences" are no longer "inferences" but have become evidence: assertions of fact from the lips of the witness about which the witness may be, and in this case was cross-examined.

Realizing that the *Douglas* case is controlling, petitioner repeatedly asserts that Cohen answered only "some" of the questions asked previously, thus leaving some prejudicial gap between what was testified to and what was given in the statement to the prosecutor. This argument completely misses the point of *Douglas* and, in any event, is belied by the record. Indeed, in attempting to document the allegation, Levy is able to cite only three questions which he claims were asked while Cohen was refusing to testify but not later when he did testify. One question—whether he gave any of the weapons to one "Muscles" Futterman—was not part of the interview, and had no reference to any of the defendants on trial. The statement of Cohen that he had given the weapon to a known killer, a "tough guy" and that he was in fear of his life also did not refer to any of the defendants. And the third question, dealing with a conversation between Levy and Cohen was testified to by Cohen, though his testimony on this point was not as detailed as his prior statement to the prosecutor, a fact which could only have benefited Levy (*cf.* 2451-2 and 2723). In short, as noted by the New York Court of Appeals, there was no "prejudicial differential between those asked and not answered and those asked and later answered" [*People* v. *Levy,* 15 N. Y. 2d 159, 166 (1965)].

Prejudiced, indeed, was the defendant Levy, but only insofar as Cohen's testimony touched upon Levy's possession of the guns. Contrary to petitioner's bald and false assertion that Cohen participated in the robbery [petitioner's brief, pp. 4-5] Cohen was not an accomplice of Levy or any of the other defendants, and his testimony in-

culpated no defendant other than Levy. The testimony of the witness, as well as his prior statement, related almost entirely to Count 9 of the indictment—i.e. unlawful possession of weapons. Cohen was merely a necessary link in tracing the weapons which Levy had in his home on December 30, 1961. That this was the sole purpose of his testimony was acknowledged by the defendant himself in his argument in the Appellate Division that Cohen's testimony was incapable of connecting Levy with the kidnapping (Levy's brief in Appellate Division, p. 24), and was implied by the prosecutor in his summation (4851-3, 4856, 4863). And it was this testimony that was used against the petitioner, not his prior refusal to testify.

Moreover, the issue under *Douglas* is not whether a prejudicial differential existed, but whether the defendant had an opportunity to cross-examine the witness about the truth of the matters allegedly asserted in the statement, as well as the making of the statement itself. In *Douglas* the Court held that the "petitioner's inability to cross-examine [the witness] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause" [*Douglas* v. *Alabama*, —— U. S. ——, 85 S. Ct. at 1077]. Petitioner, in this case, suffered no such disability.

Aside from the question of whether petitioner was deprived of his right of confrontation, it is urged that calling Cohen and questioning him in the face of his refusal to testify was so unfairly prejudicial to the defendant that it could not be cured by the subsequent testimony. *Kaplow* v. *State*, 157 So. 2d 862 (Fla. 1963), the only case cited in

support of this proposition, is not apposite. There, the prosecutor, over objection, called as his witness one of the defendants who was then on trial. Subsequently, that defendant testified on his own behalf. This fact, the Florida intermediate appellate court felt, could not undo the impropriety of the state's having compelled a *defendant* to claim his privilege against self-incrimination. Since neither judge nor prosecutor could constitutionally comment on a defendant's refusal or failure to testify [*Griffin* v. *California*, —— U. S. —— (1965), 33 U. S. L. W. 4382 (1965)], it hardly seems reasonable to permit the prosecutor to create the situation where the jury is witness to the refusal itself. More to the point is the opinion of this Court in *Namet* v. *United States*, 373 U. S. 179 (1963). Regarding the case before it as involving only a claim of evidentiary trial error, the Court summarized the lower federal court decisions, as follows:

> "None of the several decisions dealing with this question suggests that reversible error is invariably committed whenever a witness claims his privilege not to answer. Rather, the lower courts have looked to the surrounding circumstances in each case, focusing primarily on two factors, each of which suggests a distinct ground of error. First, since courts have indicated that error may be based upon a concept of prosecutorial misconduct, when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege * * * A second theory seems to rest upon the conclusion that, in the circumstances of a given case, inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination and thus unfairly prejudiced the defendant" (pp. 186-7).

Where the prosecution admitted knowing that key witnesses could validly invoke the privilege and intended to do so, but nevertheless called and questioned them, or where the prosecution's closing argument attempted to make adverse inferences from their refusal to testify, the courts have found reversible error (*id.* at 186-7). But where the incident was a minor lapse in a long trial, the courts have failed to find reversible error. "And even when the objectionable inferences might have been found prejudicial, it has been held that instructions to the jury to disregard them sufficiently cured the error" (*id.* at 187).

Applying these guidelines, it is clear that there was neither prosecutorial misconduct nor unfair prejudice. The instructions to the jury were prompt and complete; it was the sole incident in a long trial; and no attempt was made to use the refusal to testify adversely against the defendants.

Moreover, the prosecutor did not believe that Cohen would or could claim his privilege. Here, "there is no indication that the witness(es) had ever claimed the privilege in any interrogation concerning the [crime] involved in this case" [*Commonwealth* v. *Donatelli*, 198 A. 2d 338, 341 (Pa. 1964)]. On the contrary, the witness had at all times prior to taking the stand agreed to testify, and, in fact, had sworn previously that he would testify (2376, 2551); his refusal to do so came as a complete surprise to the prosecutor (2552; *cf. Fletcher* v. *United States*, 322 F. 2d 724 (D. C. 1964); *United States* v. *Maloney*, *supra* at 376). Thus, reliance upon *Washburn* v. *State*, *supra*, is misplaced, for Texas law bars the prosecutor from calling

as a witness a co-defendant or accomplice "Unless the witness has agreed to turn state's evidence" [18 Tex. Jur. 238, Sec. 142, cited in *Washburn* v. *State, supra,* at 708), which is, of course, precisely what Cohen had sworn to do.

Yet, despite this promise, the defendant claims that when Cohen, having been called to the stand, and having informed the court of his intention to refuse to testify, it was error for the court to permit and indeed to order the prosecutor to continue. "But certainly the prosecutor need not accept at face value every asserted claim of privilege, no matter how frivolous" [*Namet* v. *United States, supra,* at 188]. In this case the prosecutor and the court had every reason to regard Cohen's claim as frivolous. Initially, both the prosecutor and the court did not believe that Cohen was entitled to claim his privilege because of the grant of immunity. Cohen himself had agreed to testify knowing that the immunity offered was not intended to extend to the Bronx (2375-6). Moreover, his sworn statement would be just as admissible against him at a later trial as would his testimony. As noted by the prosecutor, "this witness has already incriminated himself when he answered questions posed by me as District Attorney in the office. He signed and initialed each of these pages. He has sworn before a notary public as to the truth of those pages" (2363). To the extent, therefore, that the prosecutor's good faith is in issue it is clear that his questioning of the witness was amply justified by the expectations engendered by the witness himself.

Insofar as the court is concerned, although it is unclear whether a prior agreement to testify is enforceable [see 8 Wigmore §2275 (3d Ed. 1940)], it is apparent that the

judge sought to confer immunity on the witness pursuant to Section 2477 of the New York Penal Law. The initial statement of that immunity was, of course, confusing in that it did not encompass the entire jurisdiction. The sole consequence of that mistake is simply that a subsequent conviction for contempt would not have been upheld [*People* v. *Brayer*, 6 App. Div. 2d 437 (1st Dept., 1958)]. It in no way changes the character of the good faith efforts by the court to compel the witness to testify pursuant to what it mistakenly believed to be an adequate grant of immunity.

In addition to the right of the judge to lay the foundation for a finding of contempt or perjury by asking a series of questions which the witness refuses to answer or answers falsely [*People* v. *Reila*, 7 N. Y. 2d 571 (1960); *People* v. *Breslin*, 306 N. Y. 294 (1954)], the court was entitled to determine whether the witness was refusing to testify because of fear of bodily harm rather than of future prosecution. Such grounds, of course, are insufficient in law to justify a refusal to testify. Supporting this possibility was the fact that the witness had previously given the prosecutor information pursuant to the same statement of immunity as that bestowed by the court initially, and as late as the evening before being called as a witness, had repeated to the prosecutor his previously expressed intention of testifying (2551). Both in the statement given to the assistant district attorney and on the witness stand, he had stated that he was in fear of being killed by the person to whom he gave the guns [clearly not one of these defendants]. That this was his real motive in refusing to testify is more strikingly evidenced by the fact that after it had

been explained to him that his immunity extended to Bronx County, he persisted in his refusal to answer.

It is obvious then, that the witness was hostile, and was, in fact, so declared by the court (2394). Establishing, on direct examination the reluctance of a witness to testify is perfectly proper (C. J. S., Witnesses, §368). This finding of hostility may be demonstrated by any competent evidence [*People* v. *Lane*, 9 App. Div. 2d 979 (3d Dept., 1959)], and it "is discretionary with the trial court as to what extent such an examination may go" (*id.* at 980). The fact that a witness now refuses to testify to that which he had related previously and had, in fact, promised to relate at trial, is surely competent evidence of present hostility.

The claims of prejudice and misconduct are further eroded by a feature so plain it may escape notice. The "coercive" tactic employed by the court to elicit testimony jeopardized only the rights of the witness himself. If an attempt was made to shield him by inadequate immunity, the defendants did not suffer. If he was threatened by punishment for contempt, the defendants did not suffer. The defendants suffered only from the testimony he eventually gave against them, and if its reliability was impaired by the means of elicitation, then the only pertinent question is: was the jury aware of it. And the answer here is, yes. That the witness asserted that he feared he himself might be incriminated by answering, obviously has no bearing on the incriminating effect against the defendants on trial. Moreover, realistically speaking, most testimony is produced by compulsion of some sort, if only the

compulsory command of a subpoena. Where the reluctance is greater, the efforts to produce proof must be intensified, if the jury is to learn the full facts. Such efforts are laudable, except insofar as they impinge on credibility. And in such cases, the jury is equipped to weigh the effects of the inducement. While considerably more dramatic, the events complained of, originating in good faith and supported by reason, occasioned no greater prejudice to the defendants than the testimony of the accomplice who was encouraged to testify by half fulfilled—and fully disclosed—expectations of leniency.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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